No. 04-14

IN THE

Supreme Court of the United States

AIR LIQUIDE AMERICA L.P., *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS and PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

Of Counsel:

LARRY R. VESELKA
KRISTIN E. ADLER
SMYSER KAPLAN
& VESELKA, L.L.P.
700 Louisiana
Suite 2300
Houston, Texas 77002

RICHARD H. CALDWELL
Counsel of Record
ANDREWS KURTH LLP
600 Travis, Suite 4200
Houston, Texas 77002
(713) 220-4200

Counsel for Respondent Port of Houston Authority of Harris County, Texas

189141

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Petitioners actually present only one question for review, although they have stated it in two different ways. Respondent believes that issue is more appropriately phrased as follows:

> Did the Fifth Circuit err in holding that the authority of the U.S. Army Corps of Engineers under the navigation servitude to require the owners of private pipelines obstructing a federal navigation project to remove those pipelines at the owners' expense was not withdrawn by the Water Resources Development Act of 1986?

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STATUTORY PROVISIONS INVOLVED

In addition to the portions of 33 U.S.C. § 2211 provided in the appendix to the petition, respondents believe that provisions of the Water Resources Development Act of 1996, U.S.C. § 2201, as well as § 60.102(a) of the Texas Water Code Ann. are involved in the issues before the Court. Therefore, these provisions are reproduced in an appendix to this opposition.

STATEMENT OF THE CASE

SUMMARY

Respondent Port of Houston Authority of Harris County, Texas (hereinafter sometimes referred to as "the Port") respectfully requests that this Court deny the Petition for Writ of Certiorari. There is no compelling reason for review of the well-reasoned and articulated judgment of the Fifth Circuit. Petitioners admit that there is no split of authority among the Circuits with respect to any issue in this case. In fact this is not a dispute over the inherent authority of Congress or the Army Corps of Engineers with respect to the navigation servitude. The underlying issue is whether Congress waived that authority in the Water Resources Development Act of 1986 Pub. L. No. 96-662, 100 Stat. 4082, codified at 33 U.S.C. §§ 2201, *et seq.* ("WRDA-86").

This Court consistently has held that any waiver of the navigation servitude must be explicit and may not be implied. However, petitioners can point to no explicit language in WRDA-86 to support their position that Congress "necessarily" intended to waive the servitude over utilities in cost-sharing navigation projects. Furthermore, the

legislative history directly contravenes petitioners' claim. Therefore there is no basis for review of the holding of the Fifth Circuit that "the Corps properly exercised its navigational servitude."

Finally, the Fifth Circuit held that even if Congress had waived the authority of the Corps to impose the cost of removal on the owner of the pipelines, the project remains a federal project, and the requirement that the owners move their pipelines was derived from the Congressional power to regulate interstate commerce, not from any authority or power of the Port. Since the Port did not require the removal of the pipelines, Texas law does not impose the cost on the Port. There also is no basis for review of this alternative holding. Significantly, the owners of over 50% of the affected pipelines (2R246-47) have chosen to concede the validity of the Fifth Circuit judgment, and do not petition this Court for certiorari.

FACTUAL CONTEXT

• The Federal Project To Deepen And Widen The Houston Ship Channel

The Houston ship channel (sometimes hereinafter referred to simply as "the channel") is a navigable waterway of the United States. 2R247-48.[1] It has been widened and deepened by federal projects a number of times since

1. Citations to the record on appeal are in the same format as record references in the Petition, indicated by "__R__," citing first by volume and then by page. It should be noted, however, that the record was numbered backward by the District Clerk. Therefore, in a citation such as "2R247-48," page 248 is actually the first page and page 247 is the next.

Congress first authorized its construction in the late nineteenth century. The most recent project had its origins in 1967, when the United States House Committee on Public Works adopted a resolution authorizing the Board of Engineers for Rivers and Harbors to review their reports on several navigation projects in the Galveston Bay area of Texas, including the Houston ship channel, to determine whether those projects should again be improved. 20R5216. The initial review, called the Reconnaissance Report, was completed in 1980. It demonstrated that modifications necessary to improve the efficiency and safety of the Galveston Bay channels were feasible and recommended that studies to accomplish those goals continue into the feasibility phase. 2R245.

The feasibility study for the Houston and Galveston channels was completed in July, 1987. 2R245. Although this first study suggested deepening the channels to 50 feet, further studies were recommended by the Board of Engineers in 1988 and by the Chief of Engineers in 1990. 2R244. The Galveston District and Southwestern Division of the Corps of Engineers undertook those studies and published a draft report for public review and comment in May 1995 that recommended proceeding with a specific 45-foot project to deepen and widen the channel. 10R2406-11R3046. The Port of Houston was designated as the local sponsor. The final report of the Corps of Engineers recommending the project (hereinafter referred to as the "LRR") was published in November 1995.[2]

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2. The project is officially titled "Houston-Galveston Navigation Channels, Texas."

- **The Pipelines And The Navigation Servitude**

The studies and reports revealed that over a hundred private pipelines under the Houston ship channel would have to be removed to accommodate the project. 11R2945. The total cost to remove these pipelines was estimated by the Corps in 1995 to exceed $115,000,000. 8R2103. This cost alone would have increased the total cost of the project by almost fifty percent. (*See* Table 25, 8R1971.) However, since the channel is a navigable waterway of the United States, the owner of each pipeline, prior to placing the line under the channel, had obtained permission from, and executed a "Section 10 permit" with, the Department of the Army or the War Department. 2R247. In each such permit, the pipeline owner (1) acknowledged that it was not receiving an interest in property, and (2) explicitly agreed that, should the Corps require, the pipeline owner would remove any obstruction (*i.e.*, its pipeline) at no cost to the government.[3] The Corps determined to exercise its Section 10 Permit authority, assert the navigation servitude, and require the owners to move the pipelines at their own expense so that this cost would not be a part of the total project cost.

The Petition for Writ misleadingly suggests that the Corps' intent was somehow hidden in administrative minutiae relating to environmental concerns. Petitioners state: "Buried in the two volumes [of the LRR] were suggestions that

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3. An example is found at 14R3654-57. The Port (which owns the land underneath the channel), also had licenses with the owners. These provided that, if needed to accommodate deepening and widening the channel, the owner will "at its cost and expense and without cost or expense to the Port . . . remove . . . or otherwise conform" its pipelines to the project. An example of one of these licenses is found at 13R3546-57.

Owners pipelines should be 'removed' along with other obstructions to the channel improvements. 8R.1981." (Pet. pg. 6.) This statement significantly distorts the record.

The May, 1995 public notice for the Corps' draft LRR report, under a bold heading, "**Project Economics**", explicitly stated that "costs associated with removing or lowering about 130 pipelines which are considered removals rather than relocations will be paid for 100 percent by the pipeline owner." 9R2395. Furthermore, the "**Recommended Plan**" section of the draft report itself contained approximately four pages of discussion on "Removals and Relocations," including a table of the pipelines that would be required to be removed. That section explicitly states that "We recommend the initial use of the Section 10 permit authority and the navigation servitude to cause removals at the owners' expense. . . ." The pipeline owners were mailed copies of the notice and the draft report (9R2361-65, 2368-69), but provided no comments or objections to the Corps. 2R240.

Thereafter, in November 1995, copies of the final LRR report were also sent to the pipeline owners for review and comment. 2R239, 9R2162-2211. The final LRR contains multiple detailed references to the fact that the pipeline owners are to pay the costs associated with moving their pipelines to accommodate the Project, starting with the "***Recommended Plan***" itself. That segment of the LRR contains an entire section on "Removals and Replacements." The very first sentence of that section states: "The costs for removal and replacement of pipelines and docking facilities within the area of navigation servitude are not included in

the baseline cost estimate because these costs are ***owner costs***, ***not project costs***." 8R2000A (emphasis added).[4]

Furthermore, the "***Recommended Plan***" discusses the issuance of permits by the Corps under Section 10 of the River and Harbors Act of 1899, (now codified at 33 U.S.C. § 403 (2001)), and specifies that all of the pipelines "are subject to the navigation servitude." 8R1992. The "Channel Design" section of the "***Recommended Plan***" states:

> The channel deepening and widening will make it necessary for some pipelines which cross the channel and dock facilities along the channel to be removed and, in most instances, replaced. Since the pipelines and docks are within the area subject to navigation servitude, the costs for these removals and replacements are not a part of the total project cost.

8R2012.

The segment of the LRR entitled "***Cost Allocation and Apportionment***" then has a detailed discussion of pipeline removals and again expressly states that these will be accomplished at owner cost:

> Project implementation will also require the owners of some pipelines, docks, or other structures to remove and replace their facilities ***at their own cost***. These costs were included in

4. At various places in the record on appeal, a page was not numbered by the clerk. On such occasions, the page is designated with the suffix "A." For example, in this citation, page 2000A is the page between page 2000 and page 2001.

> the economic evaluation to determine the economic feasibility of the recommended channel improvements; however, they were not included in the allocation and apportionment of project costs between the Federal government and project Sponsors. Corps of Engineers policy stipulates that facilities that are within the jurisdiction of navigation servitude and impede authorized navigation improvements shall be removed by the owner and ***at the owner's expense***.

8R1969 (emphasis added). The LRR then lists, in Table 27 ("Pipelines and Docks to be Removed/Replaced at Owner Cost"), each specific pipeline that the owners are required to move at their own cost. 8R1967-68A. That list includes each of the pipelines at issue in this case.

Despite this detailed discussion of the Corps' intent to exercise the servitude and impose the costs of removal on the owners of the pipelines, no comments or objections were provided by the owners. 2R239. Therefore, subsequent to the public review and comment period, the LRR, as published, was incorporated in the Chief of Engineers' report of May 9, 1996 ("Chief's Report"), (2R238) which Report was then submitted to the Secretary of the Army for transmission to Congress. 8R2113. The Chief's Report recommended that the project be implemented generally in accordance with the LRR. 8R2112.

- **Congressional Authorization Of The Project**

The project was authorized by the Water Resources Development Act of 1996, § 101(a), 110 Stat. 3658 at 3662, 3666. ("WRDA-96") That Act provides that the project will

be carried out by the Secretary of the Army "substantially in accordance with the plans, and subject to the conditions, described in the [Chief's Report]." This authorization incorporated into the statute that portion of the recommended plan that provided that the Corps would exercise its Section 10 permit authority and require the pipeline owners to move their pipelines at their own expense. *See Anderson v. Seeman*, 252 F.2d 321 (5th Cir.), *cert. denied*, 358 U.S. 820 (1958); and *Levingston Shipbuilding Co. v. Ailes*, 239 F. Supp. 775 (E.D. Tex. 1965), *aff'd*, 358 F.2d 944 (5th Cir. 1966). Congress was aware that one of the conditions in that report was for the owners to pay the cost of removing their pipelines. The report of the House Committee on Transportation and Infrastructure explicitly states that "[t]he owners of approximately 120 pipelines located beneath the channel ***will be required to bear the [c]ost of facility removal and replacement*** ($110,100,000)." 15R4109 (emphasis added).[5]

In accordance with that Congressional authorization, the Department of the Army and the Port signed a Project Cooperation Agreement and the Corps sent "Notice to Remove" letters to the pipeline owners, asserting the navigation servitude, enforcing the Section 10 permit conditions, and requiring the owners to move, at their own expense, those pipelines that were obstructing the project. 2R237. The litigation underlying this petition then ensued, the history of which is accurately summarized in the petition at pgs. 9-11.

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5. Because of the effect of its alternative holdings the Fifth Circuit did not need to reach, and did not reach, respondent's position that WRDA-96 specifically authorized the imposition of the costs of pipeline removals on the owners. In the unlikely event this Court grants the Petition for Writ and reverses on each of the two grounds supporting the Fifth Circuit judgment, the question of the scope of WRDA-96 would remain to be addressed by the Court of Appeals.

REASONS FOR DENYING THE PETITION

NEITHER OF THE ALTERNATIVE HOLDINGS SUPPORTING THE FIFTH CIRCUIT JUDGMENT REQUIRES REVIEW.

I. The Corps Properly Exercised the Navigation Servitude.

Petitioner's assertion that the judgment of the United States Court of Appeals for the Fifth Circuit should be reviewed because it "erroneously expands the constitutional navigational servitude doctrine" is itself based on the false premise that in WRDA-86 Congress implicitly waived the historical authority of the United States Army Corps of Engineers, thereafter denying the Corps the ability to enforce its Section 10 permits in relocating utilities in conjunction with federal navigation projects. Only by asserting that WRDA-86 *restricts* the servitude are petitioners able to argue that the Fifth Circuit's judgment improperly *expands* the servitude. However, this assertion distorts the language of WRDA-86 itself, misinterprets the legislative history, and disregards the prior admonitions of this Court that *any* waiver of the servitude must be express. (*See United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)).

Petitioners admit that the navigation servitude is a Congressional power that has been delegated to the Corps, and that the Corps can require removal of obstructions from navigable waters at no cost to the federal government (Pet. pg. 11). Furthermore, petitioners do not deny that application of the servitude repeatedly has been recognized to include the power to require private parties to undertake substantial and expensive alterations or removals themselves,

without compensation, or to otherwise pay the costs of removing structures owned by them that interfere with navigation. *See, e.g., Louisville Bridge Co. v. United States*, 242 U.S. 409, 415, 424-25 (1917) (upholding decree requiring bridge owner, at its cost, to comply with Secretary of War's notice to alter bridge); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1163, 1166 (9th Cir. 2000) (affirming a grant of summary judgment to the Corps imposing costs of removal on private facility owner, where the owner itself refused to move the facility); *Potomac River Ass'n v. Lundenberg Md. Seamanship Sch., Inc.*, 402 F. Supp. 344, 355-56 (D. Md. 1975) (determining that "reflection requires the conclusion" that the Corps has been delegated the cost allocation decision *de facto*); *United States v. 597.75 Acres of Land*, 241 F. Supp. 796, 799 (W.D. La. 1965) (recognizing constitutionality of government requiring owners to lower pipelines at their own expense).

The Fifth Circuit judgment that petitioners wish this Court to review rests in part on a prior decision of the Fifth Circuit that directly addresses this authority of the Corps. *United Texas Transmission Co. v. United States Army Corps of Engineers*, 7 F.3d 436 (5th Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994) ("*UTTCO*"). The facts are remarkably similar to those giving rise to this case. Two pipelines were installed under a Texas bayou pursuant to Section 10 permits issued by the Corps. Thereafter, Congress authorized a federal project for deepening and widening the bayou, just as was done here, by adopting the recommended plan of the Chief of Engineers. *See* Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, 1078 (1965). The responsibilities for that project were split between the Corps and the local drainage district. *See UTTCO*, 7 F.3d at 438.

In the exercise of the navigation servitude, the Corps informed the plaintiff that it would be required to remove its pipelines at its own cost. The plaintiff refused to do so without assurance that it would be reimbursed for the costs by the drainage district. *Id.* at 439. The primary issue in dispute was whether the drainage district was required to pay for the pipeline removals or whether the Corps, through the exercise of its Section 10 permit power, could force the pipeline owner to absorb the costs. *See id.*

In analyzing the Corps' authority as applied to property both inside and outside the physical boundaries of the navigation servitude, the court stated:

> Solely for the sake of clarity and perspective, then, we reiterate the truism that the pipeline owner must bear the cost of relocation work within the original permit area, i.e., the boundaries of the bayou existing when the § 10 permits were granted. . . . ***[The] permit language clearly gives the Corps the authority to order the relocation of pipelines inside the boundaries of the original permit area at the expense of the pipeline owners***.

UTTCO, 7 F.3d at 441-42 (emphasis added).

Petitioners relegate their only mention of the *UTTCO* case to a footnote, arguing that the Fifth Circuit attempts to "bolster its approval of the Corps' end run by relying on and extending" *UTTCO*, and asserting that the case does not support the use of the navigation servitude in this instance because it does not deal with the WRDA-86 requirement that the local sponsor "perform or assure performance" of relocations. (Pet. pg. 19 n.8) While it is true that the facts in

the case predate WRDA-86, *UTTCO* is relevant both because it explicitly recognizes the historical authority of the Corps to impose the expense of removal on the pipeline owners, and because it addresses the effect of language such as "perform or assure performance" on that authority. Nonetheless, while dismissing UTTCO with a footnote, and providing no reference to express statutory language or judicial precedent, petitioners argue that by assigning "responsibility for utility relocations to the local sponsor . . . Congress necessarily decided that the navigational servitude, a federal power, would not be asserted to effectuate utility relocations on cost-sharing navigation projects." (Pet. pgs. 19-20) This simply is a false premise based on a faulty construction.

A. Petitioners' Faulty Construction.

Early in the petition it is asserted that the Corps no longer has the authority to enforce its Section 10 permits against the permittees by requiring them to remove permitted facilities at their own expense because WRDA-86 adopted the *rule* that state law must decide which party — local sponsor or facility owner — is to shoulder utility relocation costs associated with any joint federal/state navigation project. (Pet. pg. 4) The statutory source for this "rule" is never stated clearly in the Petition. Somewhat later, as the second bullet point in their "reasons for granting the petition," petitioners assert that the Fifth Circuit judgment "interferes with congressionally mandated rules that place responsibility for removal *costs* on the local public sponsor, rather than on private property owners." (Pet. pg. 12) (emphasis added) Again, petitioners fail to identify explicitly the statutory source for the congressional "rules" that place the responsibility to pay on the local sponsor. However, since

the petition asserts that there is only one statutory provision involved in their analysis, petitioners are presumed to base both these arguments on that portion of 33 U.S.C. § 2211(a)(4) that reads: "The non-Federal interests. . . shall perform or assure the performance of all relocations of utilities necessary to carry out the project. . . ."

As is apparent, the statute expressly says nothing about imposing the "cost" on anyone. If petitioners' argument is to succeed, that language must be *construed* to mean something not otherwise clearly expressed. For example, the phrase "perform or assure the performance of" must be construed to mean "pay for" — otherwise there is no Congressionally mandated rule that places responsibility for removal *costs* on the local sponsor, as petitioners assert. However, this is the same language that petitioners also assert must be construed to mean that Congress intended to leave it to state law to determine whether or not the local sponsor is required to pay the costs. Which is the unambiguous meaning? Does the language mandate that the local sponsor has the responsibility for removal costs, (Pet. pg. 12), or that state law must decide if the local sponsor has to pay (Pet. pg. 4)? The answer is: neither. This provision adopts no "rules" as such, expressly says nothing about deferring to state law, and does not expressly preclude the local sponsor from requesting the Corps to cause the removal by exercising its Section 10 permit authority to enforce the navigation servitude.

Lacking any express statutory provision to support any "rule," petitioners are forced to the false assumption that "Congress *necessarily* decided that the navigational servitude, a federal power, would not be asserted to effectuate utility relocations on cost-sharing navigation projects." (Pet. pg. 20) (emphasis added) However, it is only

"necessary" to imply such a decision if one needs to create support for a "rule," which itself does not exist in the language of the statute. Rather than point to any provision of WRDA-86 to support this circular reasoning, petitioners simply argue from inferences they draw from comments found in the legislative history of WRDA-86 (Pet. pg. 15-17) and assert that this is proof of clear and unambiguous congressional intent. (Pet. pg. 23)

B. Legislative History Does Not Support Petitioners' Faulty Construction

The general rule articulated by this Court is that references to legislative history are acceptable only to resolve "statutory ambiguity." *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992); *see also Toibb v. Radloff*, 501 U.S. 157, 162 (1991). And the Court has generally taken a narrow view of what constitutes such ambiguous language. *See, e.g., Lamie v. United States Trustee*, 124 S. Ct. 1023, 1029-30 (2004). In any event, following this guidance, petitioners' attempted reliance on legislative history to support their position in this case can only be justified if the statutory language in question is ambiguous. However, this leaves petitioners in the position of arguing that although the statutory provision is so ambiguous one must turn to the legislative history in order to ascertain the congressional intent — the provision simultaneously is so clear that it "unambiguously" restricts the ability of the Corps to exercise the navigation servitude. Not a convincing basis for granting a writ of certiorari.

Furthermore, even the commentary that petitioners rely on does not explicitly state what petitioners assert. One must infer from the commentary that Congress "necessarily" decided to waive the servitude in these circumstances.

Not only is such inference improper, it ignores the immediately preceding paragraph of the commentary, which states:

> Except as provided in section 204, this section is not intended to place any new obligation on non-Federal interests to pay for relocations necessitated by commercial channel or harbor development involving depths of forty-five feet or less. This provision also *continues* the *current* policy that it is the responsibility of the non-Federal interest to ensure that the relocations necessary for such a project are accomplished.

H.R. Conf. Rep. No. 99-1013 at 205 (1986). (emphasis added).

This commentary makes it quite clear that, except as provided in section 204, Congress did not intend to change responsibility in any way going forward, and that it is the intent of Congress to "continue[s] the current policy." *Id.*

But what is the exception in section 204 and what is the "current policy?" Section 204 is entitled "Construction of Projects By Non-Federal Interest," and authorizes local sponsors to undertake their own non-federal harbor improvement projects. In those non-federal projects (as well as in federal projects deeper than 45 feet) § 2211(a)(4) of WRDA-86 specifies that one-half of the cost of each utility relocation shall be borne by the owner of the facility and one-half by the non-federal interest.[6] There is no commentary

6. It is for this reason that petitioners asked the courts below to hold, alternatively, that this project was a "deep draft harbor project" (Cont'd)

on § 204 in the House Conference Report relied on by petitioners. However, that report is not the sole piece of legislative history.

In Senate Report No. 99-126 there is a substantial discussion of this section authorizing non-federal harbor improvement projects. The significant paragraph is as follows:

> Where pipelines, cable, and related facilities must be relocated because non-Federal sponsors are constructing a harbor improvement under this section, such relocation or alteration cost shall be shared 50-50 between the non-Federal project sponsor and pipeline or cable owner. The full costs of upgrading or improving any such pipeline or cable shall be borne by the pipeline or cable owner. **The costs of relocation for a Federal project remain the responsibility of the pipeline or cable owners.**

Sen. Rep. No 99-126 at pg. 53 (emphasis added). Nothing needs to be inferred from that statement. It is truly direct, clear and unambiguous. WRDA-86 did not change the law for federal projects of 45 feet or less. The pipeline owners are to continue to pay the costs of relocation of their pipelines. Petitioners simply misconstrue the legislative history of WRDA-86 as well as the language of the statute itself.

(Cont'd)

within the meaning of the WRDA-86, and that therefore the cost of moving the pipelines had to be shared 50-50 between the Port and the pipeline owners. This theory was rejected by both the District Court and the Fifth Circuit. The petitioners have now abandoned that argument and no writ is sought for review of that holding.

C. Judicial Precedent Does Not Support Petitioners' Faulty Construction

One does not need to rely solely on a simple reading of the statute or its legislative history to rebut petitioners' premise that WRDA-86 "necessarily" waived the navigation servitude for future federal projects. There are two reported cases that provide substantial authority to rebut that premise, as well. In fact, there is no judicial authority that suggests otherwise. The first case was decided in the context of a pre-WRDA-86 project and the latter in the context of a project specifically authorized in WRDA-86.

1. Pre-WRDA-86

The *UTTCO* case, discussed at pgs. 8-9 above, involved a federal project authorized in 1965. Both the Chief's Report and the local cooperation agreement required that the local drainage district provide without cost to the United States "all the necessary lands, easements and rights of way" and make "all necessary alterations and relocations of structures and utilities." *UTTCO*, 7 F.3d at 438. This language is arguably even stronger than that in § 2211(a)(4) requiring the local sponsor to "perform or assure performance of" utility relocations. Just as petitioners do in this case, the owners argued in *UTTCO*, that, because the local sponsor was required to "make all necessary alterations and relocations of structures and utilities," the Corps was precluded from exercising its Section 10 permit authority to require the owner to relocate the pipelines at its sole cost. Both the district court and the Fifth Circuit rejected that argument. As the district court stated:

> This Court believes a reasonable interpretation [of the requirement in the agreement that the local

> sponsor provide rights of ways and easements and "make all necessary . . . relocations of structures"] only requires that the District pay to acquire those rights-of-way or easements that are not acquired through the power of the Corps. . . .

United Texas Transmission Co. v. United States Army Corps of Engineers, 772 F. Supp. 952, 955 (E.D. Tex. 1991). In affirming, the Fifth Circuit made clear that, as to the portions of the pipelines within the navigation servitude, the local sponsor was free to seek the exercise of federal power. *See UTTCO*, 7 F.3d at 439 n.3. This case provides assistance on two issues. One, it shows that the policy of the Corps prior to the enactment of WRDA-86 was to impose the "responsibility" for relocations on the local sponsor, while simultaneously exercising the servitude to enforce its Section 10 permits and forcing the permittees to move their pipelines at their own expense. Two, it is instructive in that the court rejected the argument made by the pipelines that by requiring the local sponsor to assume responsibility for relocations, the Corps was "necessarily" or implicitly precluded from imposing the relocation cost on the pipeline. It does predate WRDA-86. But it does not stand alone.

2. Post-WRDA-86

The dispute in *United States v. Alameda Gateway, Ltd.*, 953 F. Supp. 1106 (N.D. Cal. 1996) arose out of a federal project for the Oakland harbor that was authorized in WRDA-86. The City of Oakland was the local sponsor. The project required the removal of portions of two piers that extended into the harbor; and the Corps directed the owner, Gateway, to effect the removal. Gateway refused. The Corps then determined to exercise the navigation servitude and remove

the piers itself. It filed suit to enjoin Gateway from interfering with its plan, while reserving the right to later recover from Gateway the costs of removal. *Id.* at 1109. The issue of the effect of § 2211 arose in the context of this injunction proceeding. Citing § 2211(a)(3), Gateway argued that "the Water Resources Development Act of 1986 requires the City of Oakland, not the United States, to acquire whatever private property is needed" for the project, and Gateway also contended that the Corps was attempting to circumvent the project cooperation agreement, in which the City of Oakland had agreed to secure all necessary rights of way. The court considered these arguments by Gateway as "touching on the propriety of equitable relief," and rejected them as meritless, granting the injunction thereafter. *Id.* at 1113-14.

Although the *Alameda Gateway* case focused on the language of § 2211(a)(3) and the Project Cooperation Agreement, rather than the language of § 2211(a)(4), the argument by the facility owner in that case was essentially the same as the pipeline owners' argument in this case. And the result was the same. Despite the allocation of "responsibility" to the local sponsor, the Court held that the Corps' authority under the Rivers and Harbor Act of 1899 had not been waived. Once the injunction was obtained, the Corps removed the piers, and thereafter the Corps filed a separate suit against Gateway for reimbursement of the removal costs. Gateway again resisted the allocation of the costs of removal to it. The District Court granted summary judgment to the Corps, and the Court of Appeals affirmed in *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1163 (9th Cir. 2000).

D. No Implicit Waiver is Permitted

Finally, and perhaps most importantly, the Pipelines' argument that by assigning responsibility to the local sponsor to assure relocations Congress "necessarily" (implicitly) intended to waive the navigation servitude thereafter runs directly afoul of this Court's decision in *United States v. Cherokee Nation*, which held that any waiver of the navigation servitude and related federal authority over navigable waters "***will not be implied***, but instead must be 'surrendered in unmistakable terms.' " 480 U.S. at 707. (emphasis added) (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)); *see also Lambert Gravel Co. v. J. A. Jones Const. Co.*, 835 F.2d 1105, 1110 (5th Cir.), *cert. denied*, 487 U.S. 1236 (1988). Section 2211(a)(4) of WRDA-86 does not expressly waive the servitude, and the language on which petitioners rely hardly constitutes an "unmistakable surrender" of the power to enforce Section 10 permits to require the pipeline owners to move the pipelines at their own expense.[7]

In fact, the provision at issue was intended to place no greater burden on the local sponsor than previous law placed. It means simply what it says — for projects of this depth, the local sponsor must either perform the necessary relocations

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7. Petitioners argue, without citation to any authority, that no waiver is required because the costs at issue "are non-federal and outside any proper application of the navigational servitude." This false syllogism is no answer. First, the imposition of the servitude virtually always implicates "non-federal costs." Second, the "waiver" is required to support petitioners argument that WRDA-86 restricts the application of the servitude and limits the Corps' ability to enforce its section 10 permits as it historically had done.

or assure that they are performed. Whether that may be accomplished by requesting the Corps to exercise the navigation servitude is not addressed, and there is no reason to imply that Congress intended to withdraw the authority of the Corps to enforce its permits as it has historically done. It should be noted that the one unambiguous meaning that cannot be denied is that the cost may *not* be imposed on the federal government. Yet, if the cost is imposed on the Port, as petitioners argue, this provision would be contravened. Under 33 U.S.C. § 2211(a)(2), those costs would have to be credited (in part) against the Port's other cost obligations, and would result in some tens of millions in additional costs to the federal government.[8] Recognizing the continuing authority of the Corps to exercise the servitude, as the Fifth Circuit did in its judgment, harmonizes the statutory language and avoids that result. In this case, the Corps acted within its historical authority, and there is no legitimate need to review the Fifth Circuit holding that the Corps properly exercised the navigation servitude.

II. Texas Law Does Not Impose The Cost Of These Removals On The Port.

Pervasive throughout petitioners' argument is the underlying premise that, but for the improper use of the navigation servitude, § 60.102(a) of the Texas Water Code would have imposed the cost of removal of the pipelines on the Port. Although that direct statement is never made, and can at best be found only as an implied conclusion to a footnote (Pet. pg. 16 at n.5), the premise permeates the Petition, and underlies its invective. However, this premise, too, is false, and was specifically rejected by the Fifth Circuit.

8. The amount would vary based on total construction costs and the amount of credits for other expenses borne by the Port.

Even if the Corps were prohibited from directly specifying that the pipeline owners were to bear the cost, § 60.102(a) of the Texas Water Code would *not* impose the cost on the Port because application of that provision is itself conditioned on the Port "requiring" the relocation and, as a matter of law, "the Port did not 'require' the relocation — the Corps did." (Pet. App. at 9a.)

A. The Fifth Circuit's Holding that Texas Law Would Not Impose the Cost of Removal on the Port Was Not Dicta

Petitioners attempt to play down the Fifth Circuit's dispositive resolution of the legal issue by also dismissing it in a footnote, asserting that the Fifth Circuit's decision on this issue is mere *dicta*. (Pet. at pg. 18 n.7.) This fundamentally mischaracterizes the Fifth Circuit's decision. The resolution of this issue was an alternative ground for the Fifth Circuit's judgment, and was in direct response to the issues framed by petitioners below. In their "Statement of Issues Presented for Review," to the Fifth Circuit, petitioners asserted that, the Court should resolve: "Whether under § 60.102(a) of the Texas Water Code, the Port must bear pipeline relocation costs required by the project at its sole expense." (*See Brief of Appellees and Cross-Appellants Air Liquide America L.P., et al. at pg. 2.*) The Fifth Circuit explicitly and properly resolved that issue in the negative.

This Court has long recognized that where an appellate court puts forth two alternative holdings in a decision, each broad enough to sustain the judgment, both holdings constitute the judgment of the court and are entitled to equal validity. *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Woods v. Interstate Realty Co.*, 337 U.S.

535, 537 (1949); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). This is especially true when a positive decision on both issues is necessary to a judgment favorable to one of the parties before the appellate court. *Massachusetts v. United States*, 333 U.S. 611, 622-23 (1948) (concluding that "neither claim was either more or less essential to decision than the other, *indeed decision upon both was necessary to a judgment favorable to [petitioner]*" (emphasis added)).

This is precisely the case here. In order to prevail, the petitioners had to establish *both* that Congress expressly restricted the federal navigation servitude in WRDA-86, adopting the "rule" that state law must decide whether the local sponsor or the facility owner is to pay relocation costs, *and* that Texas law imposes that cost on the Port in this instance. The Fifth Circuit rejected each of those arguments. The fact that the Fifth Circuit resolved both of these independent issues in no way rendered the Fifth Circuit's discussion of either mere *dicta*. It is unclear whether petitioners are seeking review of the holding respecting the Texas Water Code. If not, then the petition should be denied because even if the Fifth Circuit were reversed on the issue of the navigation servitude its judgment would stand based on this alternative holding. If petitioners do intend for their petition to encompass a request for review of that holding, it should be denied because there is no basis in law or fact for reversing the holding.

B. Texas Law Does Not Impose the Cost of Removal of These Pipelines on the Port Because the Port *Did Not Require Their Removal*

Section 60.102(a) of the Texas Water Code provides that a district such as the Port must bear the expense of relocating utilities if the district has "requires" the relocation "in the exercise of the power conferred in [Subchapter E] or in the exercise of the power of eminent domain or the police power." This section does not purport to reach federal conduct and obviously cannot compel federal action. The Fifth Circuit properly held that § 60.102(a) was not triggered because Congress, acting through the Secretary of the Army, not the Port, required the owners to move their pipelines.

It was Congress, not the Port, that initiated the studies leading to the project; and it was Congress, not the Port, that authorized the Corps in WRDA-96 to undertake the Project. Finally, the specific demand requiring the owners to move their pipelines was contained in the notice to remove letters from the Corps. The petitioners cannot and do not deny that these letters required them to move their pipelines or face the consequences of having their federal permits revoked. These letters were not an exercise of any "power" of the Port—neither any power conferred by the Texas Water Code, nor the power of eminent domain, nor its police power. Without regard to whether the letters specified who should bear the expense of removal, the *requirement* that the pipelines be moved was an exercise of the federal power to regulate interstate commerce in conjunction with a federal navigation project. This fact is inescapable.

Nonetheless, petitioners continue to argue that Texas would impose the cost of removal on the Port because of the

Texas Water Code. The assertion is made that "[t]he issue, . . . never has been whether the Port had the authority to compel relocation — it does." This unsupported statement is simply wrong in every respect. First, in order to "require" the removal of the pipelines, within the meaning of the Texas Water Code, the Port has to be exercising one of the explicit powers granted to it. The Code is clear. Second, the power or authority to compel *these* pipelines to be moved was not granted to, but was specifically withheld from, the Port. When title to submerged lands was granted to the Port in 1927, the Texas Legislature explicitly gave the Port "the right, *power* and *authority* to abate and remove any and all encroachments or structures of any kind now or hereafter existing on said property, ***save such as may have been constructed under permit from the United States War Department, or other proper Federal Authority***[.]" Act of March 11, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 439 (emphasis added), found at 17R4395. Not only did the Port *not* require the owners to move their pipelines, since each of the lines was constructed under a proper federal permit, absent a voluntary agreement otherwise, the Port had no *power* or *authority* to do so.

It does not change the analysis to assert, as petitioners do, that the Port "importuned" the Corps to act, or treated it as a "partnership issue and decision." (Pet. pg. 7) The action of Congress or the Corps is not the action of the Port. The First Amendment to the United States Constitution protects the right to petition Congress and federal agencies. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961). Even if private citizens seek to inflict knowing injury upon the interests of another through legislation, the resulting act is protected if Congress acts within its power. *See id.* at 143-45. In short,

one may ask Congress to act, and if successful, it is congressional action that results, not individual action. Even if the Port sought the congressional authorization for a federal project that required the pipelines to be moved; having succeeded in obtaining that congressional action, it is ***Congress*** that "required" the removal of the pipelines, not the Port.

Finally, any request by the Port that the Corps exercise its Section 10 authority does not transform the Corps' action into action by the Port. The Port has no power to cause the Corps to honor the Port's request or to force the Corps to exercise its Section 10 authority. This Court has held specifically that there is no private right of action to enforce Section 10 of the Rivers and Harbors Act. *See California v. Sierra Club*, 451 U.S. 287, 297-98 (1981). When the Corps requires the removal of an obstacle to a navigable waterway, it is acting with the authority delegated to it by Congress. Absent a specific congressional directive, whether to enforce its Section 10 permit authority is within the discretion of the Corps, and the Port cannot compel it to act. *See Vieux Carre Prop. Owners Residents & Ass'ns, Inc. v. Brown*, 40 F.3d 112, 117 (5th Cir. 1994); *New York v. DeLyser*, 759 F. Supp. 982, 991 (W.D.N.Y. 1991). The Corps exercised its Section 10 permit authority, as delegated to it by Congress, and directed the pipeline owners to move their pipelines obstructing this congressionally authorized project. It is the Corps that exercised the congressional authority that "required" the removal of the pipelines — not the Port.

CONCLUSION

Each of the two independent holdings of the Fifth Circuit supports its judgment in this case. There are no mistakes of fact or misstatements of law underlying its holdings. Nor is there any conflict among the circuit courts of appeal on any issue raised by the petitioners. Ultimately, each of the reasons for review asserted by petitioners is based on a false premise, supported at best by a misunderstanding of the law. There being no basis in law or fact for further review of this case, respondent Port of Houston respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

RICHARD H. CALDWELL
Counsel of Record
ANDREWS KURTH LLP
600 Travis, Suite 4200
Houston, Texas 77002
(713) 220-4200

Counsel for Respondent
Port of Houston Authority
of Harris County, Texas

Of Counsel:

LARRY R. VESELKA
KRISTIN E. ADLER
SMYSER KAPLAN
& VESELKA, L.L.P.
700 Louisiana
Suite 2300
Houston, Texas 77002

APPENDIX

APPENDIX A — WATER RESOURCES DEVELOPMENT ACT OF 1996

33 U.S.C. § 2201

SEC. 101. PROJECT AUTHORIZATIONS.

(a) PROJECTS WITH CHIEF'S REPORTS. — Except as provided in this subsection, the following projects for water resources development and conservation and other purposes are authorized to be carried out by the Secretary substantially in accordance with the plans, and subject to the conditions, described in the respective reports designed in this subsection:

* * *

(30) HOUSTON-GALVESTON NAVIGATION CHANNELS, TEXAS. — The project for navigation and environmental restoration. Houston-Galveston Navigation Channels, Texas: Report of the Chief of Engineers, dated May 9, 1996, at a total cost of $298,334,000, with an estimated Federal cost of $197,237,000 and an estimated non-Federal cost of $101,097,000, and an average annual cost of $786,000 for future environmental restoration over the 50-year life of the project, with an estimated annual Federal cost of $590,000 and an estimated annual non-Federal cost of $196,000. The removal of pipelines and other obstructions that are necessary for the project shall accomplished at non-Federal expense. Non-Federal interests shall receive credit toward cash

contributions required during construction and subsequent to construction for design and construction management work that is performed by non-Federal interests and that the Secretary determines is necessary to implement the project.

* * * *

APPENDIX B — TEXAS WATER CODE ANN. (Vernon 1988)

CHAPTER 60. NAVIGATION DISTRICTS—GENERAL PROVISIONS

SUBCHAPTER E. POWERS OF DISTRICTS FOR IMPROVEMENT OF PORT FACILITIES

§ 60.102. UTILITY RELOCATION

(a) If a district in the exercise of the powers conferred by this subchapter or in the exercise of the power of eminent domain or the police power requires the relocating, raising, lowering, rerouting, or changing in grade, or altering in the construction of any railroad, electric transmission line, telegraph or telephone line, conduit, pole, properties or facilities, or pipeline, the relocating, raising, lowering, rerouting, changing in grade, or altering of construction shall be done at the sole expense of the district.